Filed 2/10/09 Zhili v. Adaimy CA2/4

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

| | |
|---|---|
| SUBHI ZHILI,<br><br>Cross-defendant and Appellant,<br><br>v.<br><br>EDMOND ADAIMY et al.,<br><br>Cross-complainants and Respondents. | B204331<br><br>(Los Angeles County Super. Ct. No. BC264379) |

APPEAL from a judgment of the Superior Court of Los Angeles County, Robert H. O'Brien, Judge. Affirmed.

Barnes, Crosby, FitzGerald & Zeman, Michael J. FitzGerald and Eric P. Francisconi for Cross-defendant and Appellant.

Lindahl Beck and David C. Moore for Cross-complainants and Respondents.

---

Subhi Zhili appeals from a judgment entered against him in this dispute over ownership interests in an adult entertainment club. He contends the arbitrator for the legal phase of the proceedings exceeded his jurisdiction by contradicting findings made by the trial court during the equitable phase of the proceedings. We conclude the arbitrator did not exceed his jurisdiction. His findings did not contradict findings made by the trial court in the trial of the equitable issues. We shall affirm the judgment.

## FACTUAL AND PROCEDURAL SUMMARY

Subhi (Dino) Zhili is married to Sandra Ruhl. Ruhl is the sole owner and managing member of Jerash, LLC (Jerash), a California limited liability company. At some point in 2001, Zhili became aware of an opportunity to establish an adult entertainment club (The Score), but needed funds to complete extensive improvements to the property, to acquire licenses, and to open operations. In May 2001, Jerash and Fam Vent III, Inc.[1] formed a California general partnership, The Pleasure Palace, doing business as The Score (the business).

Subsequently a dispute arose between Jerash, Zhili, and Ruhl, and Fam Vent III and its shareholders concerning ownership interests in the business. Jerash filed a complaint against Fam Vent III and others for breach of contract, fraud, breach of fiduciary duty and related causes of action (LASC No. BC264379). Fam Vent III responded with a cross-complaint against Jerash and others.

Zhili went to his long time friends, Edmond Adaimy and Abner Pajounia, for additional funds. A principal dispute in this litigation was whether the funds contributed by Adaimy and Pajounia constituted investments in return for an ownership interest in the business, or personal loans to Zhili. In February 2002, Adaimy, acting individually and as trustee of the Maria Botham Trust, and Pajounia entered into a memorandum of understanding (MOU) with Jerash. The MOU acknowledged "that the BOTHAM

---

[1] At times, this entity is referred to as Fam Venture III, Inc. We adopt the short form employed by that entity in its own pleadings.

TRUST and PAJOUNIA have made loans from time to time to JERASH, which shall be convertible into membership interests in JAM I, LLC an entity which will be established by the parties to own and operate the Business."

Jerash was to transfer its ownership interest in the business into this new entity, with Zhili as the sole manager. Subject to an accountant's determination of ownership interests in proportion to the respective contributions of the parties, each agreed that Jerash would have 50 percent ownership, the Botham Trust would have 30 percent, and Pajounia would have 20 percent. The MOU was purportedly executed by Ruhl on behalf of Jerash, Adaimy on behalf of the Botham Trust and individually, and by Pajounia.

This relationship also culminated in litigation. Adaimy, the Botham Trust and Pajounia (collectively Adaimy parties) were named as Roe defendants in the Fam Vent III cross-complaint against Jerash and others. The Adaimy parties filed their own cross-complaint against Jerash, Ruhl, Zhili, Fam Vent III, Inc., and others. The charging pleading is their second amended cross-complaint. It alleged 17 causes of action for breach of express written contract, breach of express oral contract, breach of implied contract, breach of the implied covenant of good faith and fair dealing, fraud, negligent misrepresentation, breach of fiduciary duty, conversion, various common counts, declaratory relief, duress and intentional and negligent infliction of emotional distress.

The trial court bifurcated the legal and equitable issues in all three actions. A court trial of the equitable issues was held first, in the fall of 2004. The court tried the declaratory relief and fiduciary duty causes of action of the Jerash complaint; the specific performance and declaratory relief causes of action of the Fam Vent III cross-complaint; and the specific performance aspect of the cause of action for breach of contract, and the two declaratory relief causes of action of the Adaimy parties' cross-complaint.

The trial court issued a tentative decision which was adopted as its statement of decision after objections by various parties were rejected. It found that Zhili was not an agent of Jerash or Ruhl in his oral and written dealings with Adaimy or Pajounia respecting loans and contributions. It also found: "Zhili was manipulating, to put it mildly, all of the people involved with the subject property, i.e., Ruhl, Jerash,

. . . Adaimy, Pajounia." Zhili was found to have signed Ruhl's name on the purported MOU between Jerash and the Adaimy parties. In addition, the court found Zhili "made representations that he owned and ran Jerash, and that he spoke on behalf of Jerash. Further, he manipulated the others into giving him money presumably for the business without Ruhl's knowledge."

The court found: "Zhili seduced Adaimy and Pajounia into contributing money upon the illusory concept that they would become percentage owners at the completion of the building of the club. He also misled them into the idea that Ruhl had signed the Memorandum of Understanding (Exhibit 83) which would have ostensibly established an apportionment of ownership among Jerash, Adaimy and Pajounia. Adaimy and Pajounia knew about the 'ownership' agreements that Zhili had made with Fam/Nabarrete. Ruhl did not know of the Memorandum of Understanding. Contrary to the Adaimy Group argument, Ruhl did not sign [the Memorandum of Understanding]."

The equitable issues raised by the Adaimy parties were identified: "The primary issues regarding the Adaimy Group are: 1) Were the moneys Adaimy and Pajounia gave Zhili re: the business [The Score] meant to be a loan, investment or contribution to ownership while they were under the misapprehension of Zhili's authority to act for Jerash?; 2) agency (authority) of Zhili?" The trial court rejected the fundamental assumption of the Adaimy Group and Fam Vent III that Zhili was the agent of Ruhl and Jerash, or that Jerash was the alter ego of Zhili.

The Adaimy parties were found to have no interest in the business and the MOU was found a nullity "insofar as it purports to establish ownership interest." Zhili was found to have had no authority to bind Jerash or Ruhl; no ownership interest in Jerash; and was found not to be an agent of Jerash on any theory. The court found: "None of the duped 'owners' (Nabarette, Gray Adaimy or Pajounia) were justified in relying on Zhili's representations to them including that he was allegedly acting on behalf of Jerash." It concluded that the Adaimy parties had failed to present evidence establishing any enforceable contract with Jerash. The court held: "The loans they [Adaimy parties] made to Zhili, as noted [in the MOU], are just that—loans to Zhili, not to Jerash or Ruhl,"

and the "clear intent and meaning [of the MOU] was to attempt to bring their 'arrangement' into a written understanding because their dealings were getting overly confusing and ambiguous. Adaimy and Pajounia wanted written protection."

The court found additional evidence that the contributions by the Adaimy parties were loans: "Adaimy understood he was making loans to Zhili up until the time of the 'Memorandum of Understanding' (Exh. 83)." The court summarized conflicting testimony by Adaimy about the amount and timing of contributions he and Pajounia made, and concluded this confusing evidence did not allow an inference as to the amount of total contributions: "Suffice it to say [Adaimy] and Pajounia did hand over money to Zhili that they were told was going toward the development of the club. Also, Adaimy made some money payments to contractors when he was working on the construction. However, this does not establish any right to ownership."

There was evidence that Zhili, Adaimy, and Pajounia attempted to come to another agreement as to ownership rights, but that Jerash (Ruhl) would not sign it. From this, the court concluded that Adaimy, Pajounia and Zhili were aware that the MOU was not "an authorized viable agreement and that Zhili never had authority to sign Ruhl's name on behalf of Jerash in [the MOU]." The second attempted agreement said that its purpose was to bring together the previous "'loans'" made by the Adaimy parties rather than investments or contributions.

Zhili was found "not credible to any reasonable person dealing with him during the building of the business." But the court expressly reserved an opinion as to the remaining causes of action brought by the Adaimy parties: "This does not mean that Adaimy and Pajounia may not have viable causes of action against Zhili, individually, e.g., Fraud (5th cause of action of second amended cross-complaint), Negligent Misrepresentation (6th cause of action of cross-complaint), Conversion (8th cause of action), Money Had and Received (9th cause of action), etc."

The court held that the Adaimy parties have no rights to ownership of the business; Zhili has no ownership or management interest which would allow him the right to sell or transfer that interest; and Jerash is the sole owner and manager of the

business. It found the causes of action for fraud (5th), negligent misrepresentation (6th), conversion (8th), money had and received (9th), accounting (10th), duress (15th), intentional infliction of emotional distress (16th) and negligent infliction of emotional distress (17th) "remain viable against Zhili only and only with regard to acts that are not dependent upon the assumption that he was acting as owner manager, or agent of Jerash or Ruhl . . . ." The court also held: "The issues decided by the court in the equitable phase of the trial become 'conclusive' and relitigation of those issues therein are estopped. See *NWOSU v. Uba* [(2004) 122 Cal.App.4th 1229]."

The parties agreed to submit these remaining causes of action to binding arbitration. They entered into a second stipulation in May 2006. In it, they agreed that the only parties in arbitration were Zhili, Pajounia, and Adaimy, individually and as trustee of the Maria Botham Trust. They also agreed the only issues in the arbitration were those related to the claims against Zhili as stated in the fifth, sixth, eighth, ninth, tenth, fifteenth, sixteenth and seventeenth causes of action. "*It is understood that Claimants are not stipulating to the findings in the tentative decision.* This limitation is the result of the ruling by Justice Edward J. Wallin (Ret.), JAMS Arbitrator, that no other issues or parties are part of this binding arbitration." (Italics added.)

The arbitrator issued a statement of reasons and an award in favor of the Adaimy parties. He made it clear that no relief was sought against Jerash or Ruhl in light of the trial court's rulings rejecting any theory of liability as to them. As to the fifteenth, sixteenth and seventeenth causes of action relating to alleged threats made by Zhili against Adaimy, Zhili's behavior was found not to rise to the level of actionable conduct. The parties agreed the tenth cause of action for an accounting was moot if the arbitrator awarded damages.

On the fifth through ninth causes of action, the arbitrator found that Zhili went to his friends, Adaimy and Pajounia, and invited them to become co-owners of the business in return for a substantial investment to be used for tenant improvements and other expenses. They gave Zhili most of the money toward these costs prior to the opening of

The Score in February 2002. In addition, both men, but primarily Adaimy, paid some of the improvement costs directly to contractors.

The arbitrator found Zhili liable for fraud. Zhili promised the Adaimy parties that the loans would be converted to ownership interests in the business when it opened, even though he knew, and Judge O'Brien found, that he did not have authority to bind Jerash or his wife to his promise. Adaimy and Pajounia knew that Zhili had a criminal record and could not be listed as a licensee for the business. "They understood that Jerash and [Ruhl] would hold the 50% share. In effect the Score was established with [Adaimy] and [Pajounia's] money but, due to [Zhili's] fraudulent conduct, they have not received the benefit of their bargain."

After Adaimy and Pajounia had invested $600,000 when The Score opened in February 2002, Zhili forged Ruhl's signature on the MOU, promising Adaimy 30 percent and Pajounia 20 percent ownership of The Score. Then he induced them to pay at least an additional $100,000 to cover their share as "owners" of purported expenses and losses during the initial months of operation. The arbitrator concluded that the amount invested by Adaimy and Pajounia "almost certainly exceeded the agreed amount of $600,000 and the additional amount after Score opened of $100,000." The arbitrator found it impossible to precisely calculate the payments, but concluded that they exceeded $700,000 and that Adaimy and Pajounia were entitled to an award in that amount. The arbitrator did not address the remaining causes of action in light of his award on the cause of action for fraud.

The arbitrator found that Zhili's false promises that the Adaimy parties would have ownership interests in The Score were "reprehensible and meets the requirements of the Civil Code for the imposition of punitive damages. Clear and convincing evidence established that [Zhili's] conduct was fraudulent and malicious." Punitive damages of $200,000 were awarded on the fraud cause of action.

Interest on $700,000 at the statutory rate of 10 percent was awarded from April 1, 2002 through April 1, 2007, for a total of $350,000. Interest on the punitive damages was

to begin running on April 1, 2007. The total award was $1,287,644 plus interest from April 1, 2007 until paid.

Zhili petitioned to vacate the arbitration award on the ground the arbitrator exceeded his powers because his award directly contradicted the findings of the court in the trial of equitable issues. He invoked Code of Civil Procedure section 1286.2, subdivision (a)(4)[2] which allows a trial court to vacate an arbitrator's award when the arbitrator exceeded his powers and the award cannot be corrected without affecting the merits of the decision upon the controversy submitted.

The Adaimy parties opposed the petition to vacate the arbitration award and asked the trial court to confirm the award under section 1285.2. The trial court denied the petition to vacate and confirmed the award. Judgment in favor of the Adaimy parties in conformity with the amounts awarded in arbitration was entered. This timely appeal followed.

## DISCUSSION

### I

Our review of an arbitration award is strictly circumscribed, as Zhili acknowledges. The general rule is that an arbitrator's decision cannot be reviewed for errors of fact or law. (*Aguilar v. Lerner* (2004) 32 Cal.4th 974, 981-982; *Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 11.) "Under Code of Civil Procedure section 1286.2 we may vacate [a] final award only under 'very limited circumstances.' (*Delaney* [*v. Dahl* (2002)] 99 Cal.App.4th [647,] p. 654.) We do not review the merits of the dispute, the sufficiency of the evidence, or the arbitrator's reasoning, nor may we correct or review an award because of an arbitrator's legal or factual error, even if it appears on the award's face. Instead, we restrict our review to whether the award should be vacated under the grounds listed in section 1286.2. (*Advanced Micro Devices, Inc. v. Intel Corp.* (1994) 9 Cal.4th 362, 372-373 (*Intel*); *Moncharsh, supra*, 3 Cal.4th at p. 11.) This means

---

[2] Statutory references are to the Code of Civil Procedure unless otherwise indicated.

that we do not review the arbitrator's findings . . . , but take them as correct. (*Intel, supra*, 9 Cal.4th at p. 367, fn. 1.)" (*Roehl v. Ritchie* (2007) 147 Cal.App.4th 338, 347.)

Zhili invokes section 1286.2, subdivision (a)(4), which allows the court to vacate an arbitration award when the arbitrator has exceeded his or her powers. "An arbitrator exceeds his powers when he acts without subject matter jurisdiction [citation], decides an issue that was not submitted to arbitration [citations], arbitrarily remakes the contract [citation], upholds an illegal contract [citation], issues an award that violates a well-defined public policy [citation], issues an award that violates a statutory right [citation], fashions a remedy that is not rationally related to the contract [citation], or selects a remedy not authorized by law [citations]. In other words, an arbitrator exceeds his powers when he acts in a manner not authorized by the contract or by law." (*Jordan v. Department of Motor Vehicles* (2002) 100 Cal.App.4th 431, 443.) "In determining whether an arbitrator exceeded his powers, we review the trial court's decision de novo, but we must give substantial deference to the arbitrator's own assessment of his contractual authority. (*Advanced Micro Devices, Inc. v. Intel Corp.*, *supra*, 9 Cal.4th at p. 376, fn. 9; *Alexander v. Blue Cross of California* (2001) 88 Cal.App.4th 1082, 1087.)" (*Jordan, supra*, at pp. 443-444.)

II

Zhili's first argument is based on the trial court's finding that "None of the duped 'owners' (Nabarette, Gray Adaimy or Pajounia) were justified in relying on Zhili's representations to them including that he was allegedly acting on behalf of Jerash." In light of this finding, he argues the Adaimy parties could not establish the element of reasonable reliance required to prove fraud. He contends the arbitrator disregarded this finding and premised the entire award on the cause of action for fraud.

Zhili reads too much into the trial court's finding. The language on which he relies appears in the trial court's discussion of whether Zhili was an agent for Jerash or Ruhl, or whether Jerash was his alter ego. Zhili's arguments fail to take into account the crucial distinction drawn by the trial court between the failure of an effort to make Jerash or Ruhl liable for Zhili's misrepresentations on an agency theory, and the possibility of

proving Zhili's individual liability for fraud. After concluding that no agency was proven, and after making the finding on which Zhili premises his argument, the trial court held that the Adaimy parties had a viable cause of action against Zhili for fraud "only with regard to acts that are not dependent upon the assumption that he was acting as owner manager, or agent of Jerash or Ruhl." The construction urged by Zhili would mean that there was no viable cause of action against him for fraud, contrary to the trial court's express holding. The trial court did not address any issues regarding Zhili's individual liability on that theory. In addition, we note that the same trial court judge rejected this argument in Zhili's petition to vacate the arbitration award.

Zhili also contends the arbitrator "set the 'reasonable reliance' standard on its head by stating that, effectively, Adaimy and Pajounia were not required to establish reasonable reliance: '[Adaimy] and [Pajounia] may have been too trusting, and even gullible, but this only makes [Zhili's] conduct in taking advantage of them even more reprehensible.' [AA 209:27-210:1]."

But this observation by the arbitrator appears in his discussion of Zhili's liability for punitive damages, not in the discussion of whether the cause of action for fraud was proven. It is apparent that the arbitrator was discussing whether the standard for an award of punitive damages under Civil Code section 3294 was satisfied, rather than discussing the reliance element of the causes of action for fraud and misrepresentation. In addition, as we have seen, we may not review the award of the arbitrator for legal error. (*Moncharsh v. Heily & Blase*, *supra*, 3 Cal.4th at p. 11.) "[A]rbitrators do not 'exceed[] their powers' within the meaning of section 1286.2, subdivision (d) and 1286.6, subdivision (b) merely by rendering an erroneous decision on a legal or factual issue, so long as the issue was within the scope of the controversy submitted to the arbitrators. 'The arbitrator's resolution of these issues is what the parties bargained for in the arbitration agreement.'" (*Moshonov v. Walsh* (2000) 22 Cal.4th 771, 775-776, quoting *Moncharsh*, *supra*, 3 Cal.4th at p. 28.) The parties expressly submitted the fifth cause of action for fraud to binding arbitration.

III

Zhili next argues that the arbitrator consistently found that the Adaimy parties contributed money toward an ownership interest in The Score, as opposed to making personal loans to him. He contends that these findings contradicted the trial court's statement of decision in which the court found that the money paid by the Adaimy parties to Zhili constituted personal loans rather than contributions to Jerash or Ruhl. Like the Adaimy parties, we do not see why this distinction makes a difference. The arbitrator clearly found that the Adaimy parties were defrauded into giving money to Zhili, an issue expressly reserved by the trial court for later determination and made a part of the arbitration by stipulation. As we have stated, we may not review the factual or legal findings made by the arbitrator. (*Moncharsh, supra,* 3 Cal.4th at p. 11.)

IV

Next, Zhili argues the arbitrator's award of $700,000 in compensatory damages contradicts the trial court's finding that there was a lack of comprehensible facts presented in the trial of the equitable issues as to the amount of the money given Zhili by the Adaimy parties. Such a contradiction, he claims, was in excess of the arbitrator's authority and constitutes a basis for reversal under section 1286.2, subdivision (a)(4).

The trial court did not indicate in any way that the Adaimy parties would be prohibited from presenting new or additional evidence of the amounts they paid in the trial (or arbitration) of their cause of action for fraud. It simply said that the fraud and other causes of action remained viable against Zhili to be determined in a separate phase of the litigation. The construction urged by Zhili is inconsistent with the trial court's ruling that the damages claims remained viable.

V

Zhili argues finally: "If the award for fraud and negligent misrepresentation was beyond the powers of the arbitrator, then of course the punitive damages based upon

those causes of action also are beyond those powers."[3] We have found no action by the arbitrator in excess of his powers in awarding damages against Zhili for fraud.

Based on the trial court's finding that Zhili has no ownership or management interest in the business, or in Jerash, he argues the arbitrator exceeded his powers in premising his award of punitive damages on Zhili's community property interest in The Score. In discussing Zhili's net worth for the purposes of calculating punitive damages, the arbitrator said: "There is scant evidence of [Zhili's] net worth. However he does have a community interest in Score and apparently is involved in other ventures. His Score interest can be presumed to be worth at least the $700,000 paid by [the Adaimy parties] toward its completion and opening."

This is not a contradiction of the trial court's statement of decision. The trial court did not address Zhili's net worth in trying the equitable issues. In his reply brief, Zhili asserts: "[T]here is no record of *any* evidence having been presented to the Arbitrator as to Zhili's financial condition." Once again, he appears to ask us to review the factual support for the arbitrator's award of punitive damages, which we may not do. (*Moncharsh*, *supra*, 3 Cal.4th at p. 11.)

---

[3] Contrary to Zhili's statement, the arbitrator did not consider the cause of action for negligent misrepresentation after finding Zhili liable for fraud.

## DISPOSITION

The judgment is affirmed. Respondents are to have their costs on appeal.

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.**

EPSTEIN, P.J.

We concur:

WILLHITE, J.

SUZUKAWA, J.